In the Supreme Court of the United States.

DECEMBER TERM, 1868.

THE PRESIDENT, DIRECTORS, AND Company of the Veazie Bank, *vs.*, JEREMIAH FENNO, COLLECTOR OF internal revenue. } No. 153.

Brief for the defendant.

This case is brought here on a certificate of a division of opinion between the judges of the circuit court for the first circuit and the district of Maine.

Under the second clause, ninth section, of the act of Congress approved July 13, 1866, entitled "An act to reduce internal taxation," &c., a tax of ten per cent. had been assessed against said bank, a State bank incorporated by the legislature of the State of Maine, upon State bank-bills issued for circulation and paid out since August 1, 1866; and the same, with penalty and costs, had been paid by the plaintiff to the defendant, under protest and to avoid a distraint. To recover back the money thus paid, this action was brought.

The questions upon which a division of opinion was certified are—

First. Whether the second clause of the ninth section of the act of Congress of the 13th of July, 1866, under which the tax in this case was assessed and collected, is a valid and constitutional law.

Second. Whether that clause conferred the legal and constitutional power upon the defendant, under his warrant from the assessor, to collect the tax in this case of the plaintiffs.

Third. Whether Congress possessed the power, under the Constitution, to enact that provision of the statute, and to authorize the assessment and collection of the tax in this case.

For the defendant it is now maintained—

I. The tax in question is not a direct tax within the meaning of the Constitution of the United States.

Stat. 1865–'66, chap. 184, sec. 9 bis., clause 2d (Stat. at Large, vol. 14, p. 146).

Const. U. S., art. 1, sec. 2; sec. 9, clause 4.

Hylton *vs.* United States, 3 Dall., 171.

Pacific Insurance Co. *vs.* Soulé, 7 Wallace, 434.

It is not a tax capable of being apportioned among the States according to numbers.

1 Story on Const., 2d ed., p. 672.

II. It is an excise or duty upon a branch of business, or the mode of carrying on business, of the same description, by all corporations of a certain character.

Const. U. S., art., 1, sec. 8, clause 1.

Society for Savings *vs.* Coite, 6 Wallace, 594.

III. Congress would have the constitutional right to prohibit what they thus undertake to tax; and whatever they may prohibit (not *malum in se)*, they may regulate, or permit upon condition.

IV. If Congress have the power to tax, the degree of taxation is not to be regarded by this court, but is within the discretion of Congress, whose motives cannot be inquired into within the scope of their constitutional functions.

McCulloch *vs.* Maryland, 4 Wheat., 316, 430; Ex parte McCardle, 7 Wallace, 514; Pacific Ins. Co. *vs.* Soulé, 7 Wall., 443.

V. The power to tax includes the power to make taxation burdensome, or even destructive, to particular branches of business.

McCulloch *vs.* Maryland, 4 Wheat, 316, 427, 431.

1 Story on the Const., book 3, ch. XIV, sec.

VI. The uniformity required in taxation is not violated by an exception made on public grounds, the exception being in itself uniform in all the States.

E. R. HOAR,
Attorney General.

Nathan v. Louisiana 8 How 73

Veazie v. Jackson 5 Wall 62